APPENDIX "A"

No. 92-16462

D.C. No. 88-0773-DAE

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

NUI LOA PRICE, DR., AKA MAUI LOA, individually and in his capacity as chief of the Hou Hawaiians; THE HOU HAWAIIANS, a native Hawaiian Ohana; KAMUELA PRICE, individually and in his capacity as member of elder council of the Hou Hawaiians, *Plaintiffs-Appellees*,

v.

MOANIKEALA AKAKA; ROD BURGESS; CLARENCE CHING; FRENCHY DESOTO; LOUISE HAO; MANU KAHAIALII; THOMAS KALUKUKUI, SR.; MOSES KEALE, SR.; and KEVIN MAHOE, *Defendants-Appellants*.

Appeal from the United States District Court for the District of Hawaii, David A. Ezra, District Judge, Presiding

Argued and Submitted May 5, 1993--Honolulu, Hawaii

Filed August 23, 1993

Amended November 2, 1993

Before: Alfred T. Goodwin, Thomas Tang and John T. Noonan, Jr., Circuit Judges

Opinion By Judge Tang

OPINION

TANG, Circuit Judge:

Dr. Nui Loa Price, Kamuela Price, and the Hou Hawaiians, a native Hawaiian tribal body, (collectively "Price") sued the board of trustees ("trustees") for the Office of Hawaiian Affairs ("OHA") in their individual capacities under 42 U.S.C. § 1983 for commingling, managing, administering, and expending trust funds in violation of the Hawaii Admission Act of 1959, Pub. L. No. 86-3, 73 Stat. 4 ("Admission Act"). The trustees moved for judgment on the grounds of qualified or

absolute immunity. The motion was granted in part and denied in part. The trustees brought this interlocutory appeal challenging the partial denial of immunity. The trustees argue that they are entitled to immunity for using trust funds for a referendum on whether the definition of "native Hawaiian" should be amended to include all people of Hawaiian ancestry and not just those with 50% or more Hawaiian blood (the "Single definition Referendum"). The trustees additionally contest the district court's determination that Price has standing to bring a § 1983 claim based on the Admission Act. We affirm in part and reverse in part.

Historical Background

In 1959, Congress admitted Hawaii into the Union and "declared [Hawaii] to be a State of the United States of America." Admission Act. In return, Hawaii made a compact with the United States to adopt the "Hawaiian Homes Commission Act, 1920." Pub. L. No. 34, ch. 42, 42 Stat. 108 (1921 ("HHCA"), as part of its state constitution. *Id.* § 4. Under the HHCA, some 200,000 acres of land designated as "available lands" were to be leased to native Hawaiians at a nominal rate for 99 years. The HHCA defines "native Hawaiian" as "any descendant of not less than one-half part of the blood of the races inhabiting the Hawaiian Islands previous to 1778." HHCA § 201.[1]

Section 5(b) of the Admission Act granted Hawaii "title to all the public lands and other public property within the boundaries of the State of Hawaii," including the "available lands" set out in the HHCA, (hereinafter "§ 5(b) lands"). *See Price v. Akaka*, 928 F.2d 824, 826 n.1, (9th Cir. 1990) ("*Akaka I*"), *cert. denied*, 112 S.Ct. 436, (1991). Hawaii holds these § 5(b) lands as a public trust for five purposes: (1) for the support of public

[1] Unless otherwise stated, the term «native Hawaiian» shall be used as defined by the Hawaii Homes Commission Act.

schools and other public educational institutions; (2) for the betterment of the conditions of native Hawaiians; (3) for the development of farm and home ownership; (4) for the making of public improvements; and (5) for the provision of lands for public use. Admission Act § 5(f).[2]

In accordance with the Admission Act, Hawaii amended its constitution and declared that "[t]he lands granted to the State of Hawaii by Section 5(b) of the Admission Act . . . excluding therefrom lands defined as 'available lands' by . . . the [HHCA] . . . shall be held by the State as a public trust for native Hawaiians and the general public." Haw. Const. art. XII, § 4. The OHA was charged with the responsibility of administering and managing the trust proceeds. Hawaii then enacted Chapter 10 of the Hawaii Revised Statutes ("H.R.S.") to fund the OHA. Under H.R.S. §§ 10-13.5 and 10-3, the OHA is funded in part with twenty percent of all income derived from the § 5(f) public trust. As to this transfer, we held that:

> Transferring a portion of the § 5(f) trust income to a state agency . . . [does] not dissolve or dilute the restrictions on how that income may be spent. So long as § 5(f) trust income remained in the hands of the state, as it did when transferred from the § 5(f) corpus to the OHA corpus, the § 5(f) obligations applied. Naturally, we accept that once the income has been "disposed of" or "used" by the state, there are no § 5(f) limitations on subsequent use; however, we reject the trustees' suggestion that Hawaii "disposed of" or "used" § 5(f) trust income simply by transferring it to the OHA. Admission Act § 5(f).

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[2] Although the § 5(b) lands include the «available lands» under the HHCA, § 4 of the Admission Act «strictly limits the manner in which Hawaii may manage the homelands and the income they produce.» *Price v. Akaka*, 828 F.2d 824, 826 n.1, (9th Cir. 1990) («*Akaka I*»), *cert. denied* 112 S.Ct. 436 (1991).

> Because the funds are still in state hands, § 5(f)'s restrictions apply to the use or disposal of the income *by* OHA.

Akaka I, 928 F.2d at 827.

Thus, the issue here is whether the trustees breached their fiduciary duties under the Admission Act by expending trust funds for purposes other than those set out in § 5(f).[3]

Factual Background

The OHA trustees proposed a "Single Definition Referendum" to native Hawaiians and Hawaiians, concerning whether the definition of native Hawaiians should be amended to include all people of Hawaiian ancestry and not just those with 50% or more Hawaiian blood. The trustees believed that "adoption of a single definition would better the condition of native Hawaiians, in that the blood quantum requirement had long been recognized as the single most divisive issue in the Hawaiian community." The trustees used § 5(f) funds for mailing out and distributing the nonbinding Referendum ballots.

In response, Price filed a complaint under 42 U.S.C. § 1983 against he trustees in their individual capacities challenging this expenditure of § 5(f) funds. The complaint alleged that the trustees: (1) wrongfully commingled § 5(f) funds with other OHA funds; (2) failed to manage and administer the trust in accordance with Congress' purposes and in particular for the benefit of native Hawaiians; (3) expended § 5(f) funds for purposes contrary to § 5(f) of the Admission Act; and (4) expended

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[3] Whether the Trustees breached their fiduciary duties under Chapter 10 of the H.R.S. is a matter of state law which we do not reach. *See Price v. State of Hawaii*, 921 F.2d 950, 956, (9th Cir. 1990) («*Price II*») («it is not [the federal court's] function to attempt to seek out conflicts between the enactments of the State and section 5(f) of the Act»).

§ 5(f) funds for the benefit of non-native Hawaiians who are not beneficiaries under § 5(f) of the Admission Act.

The trustees moved to dismiss the action. The district court granted the motion holding that "the complaint failed to state a claim because the Admission Act did not impose the obligations which plaintiffs assert were violated, and because the suit was against defendants in their official capacities and therefore barred by the Eleventh Amendment."

On appeal, we held that because Price alleged that the trustees expended § 5(f) funds in contravention of the Admission Act he stated a federal claim enforceable under 42 U.S.C § 1983. *Akaka I*, 928 F.2d at 827-28. We further held that because Price is suing the trustees in their individual capacities the Eleventh Amendment does not apply, *id*, at 828, and reversed and remanded the case to the district court, *id*, at 829.

On remand, the district court ruled that the trustees were entitled to qualified immunity with regard to the claim that they improperly commingled and used § 5(f) funds to pay the OHA's operating expenses.[4] The district court, however, denied the trustees immunity as to the claims that the trustees managed, administered, and expended § 5(f) funds for the Single Definition Referendum, in violation of the Admission Act. The district court then granted the trustees' motion for a stay pending this interlocutory appeal.

I. *Standing to bring a § 1983 cause of action*

Before proceeding to address the question raised on this interlocutory appeal, we must determine whether there is standing. *City of South Lake Tahoe v. California Tahoe*, 623 F.2d 231, 233, (9th Cir.) (citation omitted) ("Standing is a necessary element of federal-court jurisdiction.), *cert denied*, 449 U.S. 1039 (1989). There-

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[4] The parties do not appeal this decision.

fore, as a threshold issue, we first turn to the trustees' contention that Price lacks standing to bring a § 1983 cause of action based on the Admission Act. The issue is two-fold: (1) whether Price has standing; and (2) whether Price may bring a § 1983 cause of action based on the Admission Act.

A.

The trustees argue that Price does not have standing because of the Supreme Court's rational in *Lujan v. Defenders of Wildlife*, 112 S.Ct. 2130 (1992). We disagree. *Lujan* involved a challenge to a new regulation interpreting § 7 of the Endangered Species Act of 1973 ("ESA") to apply only within the United States or on the high seas. Specifically, plaintiffs filed an "action against the Secretary of the Interior, seeking a declaratory judgment that the new regulation is in error as to the geographic scope of § 7(a)(2), and an injunction requiring the Secretary to promulgate a new regulation restoring the initial interpretation." *Id.* at 2135. The Court found plaintiffs failed to show standing to enforce the ESA.

The Court set out a three-part test and stated that a plaintiff has standing if: (1) plaintiff suffered an "actual or imminent" injury; (3) there is a "causal connection between the injury and the conduct complained of;" and (3) that injury will likely be "redressed by a favorable decision," *Id.* at 2136. Whether a plaintiff is the object of the action at issue will affect the standing analysis:

> When the suit is one challenging the legality of government action or inaction, the nature and extent of facts that must be averred (at the summary judgment stage) or proved (at the trial stage) in order to establish standing depends considerably upon whether the plaintiff is himself an object of the action (or foregone action) at issue. If he is, there is ordinarily little question that the action or inaction has caused him injury, and that a judgment preventing or requiring the action will redress it. When, howev-

> er, as in this case, a plaintiff's asserted injury arises from the government's allegedly unlawful regulation (or lack of regulation) of *someone else*, much more is needed.

Id. at 2137.

The Court determined that it was dealing with the latter situation. It then applied the standing requirements strictly where a "plaintiff's asserted injury arises from the government's allegedly unlawful regulation (or lack of regulation) of *someone else*." 112 S.Ct. at 2137.

The present case, unlike *Lujan*, does not involve a suit against government for promulgating an unlawful regulation or for failing to promulgate a regulation. Rather, Price is among the class of § 5(f) beneficiaries whose welfare is the object of the action at issue. Therefore, there is "little question that the [trustees'] action or inaction has caused him injury, and that a judgment preventing or requiring action will redress it." *Id.*[5] Moreover, we have held that "Price, as a native Hawaiian, has standing to seek redress for past violations of § 5(f)." *Akaka I*, 928 F.2d at 827 n.2. The Supreme Court's rationale in *Lujan* does not compel a different result. Price has standing.

B.

In light of the Supreme Court's recent decision in *Suter v. Artist M.*, 112 S.Ct. 1360 (1992), the trustees argue that § 1983 claims based on the Admission Act simply cannot be brought. This argument fails unless *Suter* overruled our prior decision in *Keaukaha-Panaewa Community Ass'n v. Hawaiian Homes Comm'n*, 739 F.2d 1467, 1472, (1984) ("*Keaukaha II*"), where we held that

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[5] Previously, we stated that "Price, as a native Hawaiian, has standing to seek redress for past violations of § 5(f) even though that redress may not necessarily benefit native Hawaiians. *Akaka I*, 928 F.2d at 827 n.2.

a § 1983 cause of action may be brought under the Admission Act.

The issue in *Suter* was "whether private individuals have the right to enforce by suit a provision of the Adoption Assistance and Child Welfare Act of 1980 (Adoption Act or Act) either under the Act itself or through an action under 42 U.S.C. § 1983." 112 S.Ct. at 1363 (citation and footnote omitted). As to the § 1983 issue, the *Suter* Court states:

> In *Maine v. Thiboutot*, 448 U.S. 1 (1980), we first established that § 1983 is available as a remedy for violations of federal statutes as well as for constitutional violations. We have subsequently recognized that § 1983 is not available to enforce a violation of a federal statutes "where Congress has foreclosed such enforcement of the statute in the enactment itself and where the statute did not create enforceable rights, privileges, or immunities within the meaning of § 1983."

Id. at 1366 (parallel citations omitted) (quotation omitted). The Court then stated that "[s]ection 1983 speaks in terms of 'rights, privileges, or immunities,' not violations of federal law," *id.* at 1367 (quotation omitted), and concluded that the Adoption Act does not create a federally enforceable right under § 1983. *Id.* at 1370.

The trustees argue that, as in *Suter*, § 1983 claims may not be brought to challenge violations of the Admission Act because the Admission Act does not create a federally enforceable right. We disagree. The instant case involves a public trust,[6] and under basic trust law principles, beneficiaries have the right to "maintain a

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[6] As stated before, under the Admission Act, the United States and Hawaii entered into a compact whereby the United States granted Hawaii title to all § 5(f) lands and Hawaii agreed to hold the § 5(b) lands as a public trust. Hawaii Admission Act of 1959, Pub. L. 86-3, 73 Stat 4, §§ 4 and 5.

suit (a) to compel the trustee to perform his duties as trustee; (b) to enjoin the trustee from committing a breach of trust; [and] (c) to compel the trustee to redress a breach of trust." Restatement 2d of the Law of Trusts, § 199; *see also id.* at § 200, comment a ("Normally a suit against a trustee to enforce the trust or to enjoin or obtain redress for a breach of trust is brought by a beneficiary.") We have accordingly held that "allowing Price to enforce § 5(f) is consistent with the common law of trusts, in which one whose status as a beneficiary depends upon the discretion of the trustee nevertheless may sue to compel the trustee to abide by the terms of the trust." *Akaka I*, 928 F.2d at 826-27.

Our decisions in *Keaukaha II*, 739 F.2d at 1472, and *Akaka I*, 928 F.2d at 828, holding that beneficiaries of the public trust created by Congress may bring a § 1983 claim are consistent with the Supreme Court's decision in *Suter*. Congress enacted the Admission Act, a federal public trust, which by its nature creates a federally enforceable right for its beneficiaries to maintain an action against the trustee in breach of the trust. As a beneficiary, Price may therefore bring a § 1983 action under the Hawaii Admission Act against the trustees.

II. *Qualified Immunity*

As the Supreme Court stated in *Harlow v. Fitzgerald*, 457 U.S. 800 (1982), "government officials performing discretionary functions generally are shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Id.* at 818 (citations omitted). In ruling that the trustees' use of § 5(f) monies to fund the Single Definition Referendum violated clearly established law the district court stated:

> First, § 5(f) provides for management and disposition of the funds in accordance with the five purposes set forth therein "in such manner as the constitution

> and laws of said State may provide." In accordance with this directive, the State in establishing OHA, statutorily provided that the public trust funds appropriated to OHA would *only* be used for the benefit of native Hawaiians.
>
> Further, the Attorney General opinion issued in 1983 unequivocally advised OHA that the Hawaii legislature could not authorize the use of § 5(f) funds to better the conditions of Hawaiians. Accordingly, this court finds that the contours of the law in 1988 was "sufficiently clear that a reasonable official would understand that what he was doing violates that right." Therefore, if § 5(f) funds were used to advance the single definition referendum, defendants would not be entitled to qualified immunity for their actions

(Emphasis added) (internal citation and quotation omitted).

First of all, an Attorney General's opinion cannot by itself establish "clearly established law." *See Cedar Shake and Shingle Bureau v. City of Los Angeles*, No. 91-56727, slip op. 6679, 6691 (9th Cir. June 30, 1993) (the courts are not bound by an Attorney General's opinions, although they are generally regarded as highly persuasive); *Price II*, 921 F.2d at 957 (the Attorney General's opinion regarding the use of § 5(f) funds in the hands of OHA had no affect on the court's analysis); *Guardian Plans Inc. v. Tague*, 870 F.2d 123, 129, (the Cir.) (Attorney General's opinion "does not have the force of law"), *cert. denied*, 493 U.S. 882 (1989); *Nicholson v. Gant*, 816 F.2d 591, 595, (9th Cir. 1987) (The Attorney General's opinion "is not law and not binding").

Secondly, there is no clearly established law prohibiting the OHA trustees from expending § 5(f) funds in support of the Single Definition Referendum which questioned the 50% or more blood quantum requirement for native Hawaiian status. The restriction of section 5(f), incorporating the HHCA definition and confining the

"betterment" purpose[7] of the lands trust funds to those of 50% or more blood, remains in place as governing federal law.[8] *See Hoohuli v. Ariyoshi*, 630 F.Supp. 1153, 1160 n.31 (D.Haw. 1986). While actually changing the definition of native Hawaiian contained in the HHCA, or the administration of OHA programs in conformance with a revised definition, would violate clearly established federal law, the Referendum did not do so. The OHA trustees reasonably believed that a referendum to determine Hawaiian opinion on the proper definition of "native Hawaiian" was for the "betterment of the conditions of native Hawaiians" as presently defined. *See Hoohuli*, 631 F.Supp. at 1161 (evidence showed "that the rationale for defining 'native Hawaiian' in the HHCA in 1920 had become outmoded" and that "defining 'Hawaiian' to include all people of aboriginal blood could help alleviate divisiveness in the Hawaiian community resulting from blood quantum restrictions); *Kepo'o v. Burgess*, No. 88-2987-09 (Haw. 1st Cir. 1988) (In an order denying a motion for preliminary injunction, Judge Milks found that there was no evidence that the Single Definition Referendum would not be for the betterment of conditions of native Hawaiians and that such Referen-

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[7] Section 5(f) of the Admission Act states that the § 5(b) lands «shall be held by [Hawaii] as a public trust for the support of the public schools and other public educational institutions, for the *betterment of the conditions of native Hawaiians*, . . . , for the development of farm and home ownership on as widespread a basis as possible for the making of public improvements, and for the provision of lands for public use.» (Emphasis added). *See also Price v. State of Hawaii*, 764 F.2d 623, 625, (9th Cir. 1985) («*Price I*») («Proceeds from the section 5(f) trust are to be devoted to 'one or more' of the five statutory purposes, one of which is 'for the betterment of the conditions of native Hawaiians.'», *cert. denied*, 474 U.S. 1055 (1986).

[8] Also remaining in place are the restrictions placed by section 4 of the Admission Act on the «homelands,» which are not part of the trust administered by the OHA. *See Price I*, 928 F.2d at 826 n.1.

dum is "one of many ways to achieve the betterment of the conditions of native Hawaiians even though all Hawaiians would benefit.")[9]

Moreover, in 1978, the Hawaii legislature directed the OHA to address the issue of whether the blood quantum requirement should be amended. *See* Stand. Comm. Rep. No. 59, Hawaii Constitutional Convention of 1978, Vol. I, at 644 ("Although your Committee was tempted to change this outmoded [blood quantum] rule from the 1920s, your Committee concluded that this responsibility should be assumed by the Office of Hawaiian Affairs.").

Thus, the OHA trustees, were entitled to qualified immunity as to Price's claims that they violated the Admission Act by improperly managing, administering, and expending § 5(f) funds for the Single Definition Referendum.[10]

CONCLUSION

We AFFIRM the district court's determination that Price has standing to bring a § 1983 cause of action based on the Admission Act and REVERSE the district court's ruling that the trustees were not entitled to qualified immunity.

AFFIRMED in part, and REVERSED in part.

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[9] The case ultimately was affirmed in a memorandum decision by the Hawaii Supreme Court, No. 88-2987 (1991).

[10] Because we find that trustees are entitled to qualified immunity we do not reach the question of whether the trustees are also entitled to absolute immunity.

APPENDIX "B"

Civil No. 88-00773 DAE

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF HAWAII

DOCTOR NUI LOA PRICE, A.K.A. MAUI LOA, individually and in his capacity as chief of the Hou Hawaiians, THE HOU HAWAIIANS, a native Hawaiian Ohana, and KAMUELA PRICE, individually, and in his capacity as member of the council of the Hou Hawaiians,
Plaintiffs,

vs.

MOANIKEALA AKAKA, ROD BURGESS, CLARENCE CHING, FRENCHY DESOTO, LOUIS HAO, MANU KAHAIALII, THOMAS KALUKUKUI, SR., MOSES KEALE, SR., and KEVIN MAHOE,
Defendants.

Filed in the United States District Court, District of Hawaii

June 12, 1992 at 11 o'clock and 10 min. a.m.

Walter A. Y. H. Chinn, Clerk

ORDER GRANTING IN PART AND DENYING IN PART MOTION FOR JUDGMENT ON THE PLEADINGS, OR IN THE ALTERNATIVE FOR SUMMARY JUDGMENT, AND DENYING MOTION TO AMEND COMPLAINT, AND MOTION TO STRIKE EXHIBITS, MOTION FOR SANCTIONS

Defendants Moanikeala Akaka, Rod Burgess, Clarence Ching, Frenchy DeSoto, Louis Hao, Manu Kahaialii, Thomas Kalukukui, Sr., Moses Keale, Sr., and Kevin Mahoe's ("defendants") motion for judgment on the pleadings, or in the alternative for summary judgment and conditional motion for stay, and plaintiffs Nui Loa Price, a.k.a. Maui Loa, the Hou Hawaiians and Kamuela Price's ("plaintiffs") motions to amend complaint, to strike exhibits and for sanctions came on for hearing

before this court on December 27, 1991, and April 20, 1992. Steven S. Michaels, Esq. appeared on behalf of defendants; Walter R. Schoettle, Esq. appeared on behalf of plaintiffs Maui Loa and the Hou Hawaiians; Kamuela Price appeared *pro se*.[1] The court having considered the moving papers, the arguments of counsel and the records and files herein, hereby grants in part and denies in part defendants' motion for summary judgment, and denies all other motions.

BACKGROUND

When Hawaii achieved statehood in 1959, Congress granted to the State of Hawaii most of the Hawaiian lands to which the federal government held title. *See* Hawaii Admission Act, Pub.L. No. 86-3 ("Admission Act"), § 5(b), 73 Stat. 4, 5 (1959), as amended by the Hawaiian Omnibus Act, Pub.L. No. 86-624, 74 Stat. 411 (1960). Congress imposed the following obligations upon Hawaii with respect to these lands:

> The lands granted to the State of Hawaii by subsection (b) of this section and public lands retained by the United States under subsections (c) and (d) and later conveyed to the State under subsection (e), together with the proceeds from the sale or other disposition of any such lands and the income therefrom, shall be held by the said State as a public trust for the support of the public schools and other public educational institutions, for the betterment of the conditions of native Hawaiians, as defined in the Hawaiian Homes Commission Act, 1920, as amended, for the development of farm and home ownership on as widespread a basis as possible for the making of public improvements, and for the provision of

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[1] Although Kamuela Price is appearing *pro se*, Mr. Schoettle advised the court at the December 27, 1991 hearing that he prepared and filed all pleadings on behalf of all plaintiffs, including Kamuela Price, in this action.

> lands for public use. *Such lands, proceeds, and income shall be managed and disposed of for one or more of the foregoing purposes in such manner as the constitution and laws of said State may provide, and their use for any other object shall constitute a breach of trust for which suit may be brought by the United States.*

See Admission Act § 5(f) (emphasis added).

In its constitution, Hawaii accepted the trust lands and declared that it would hold a portion of the lands conveyed by § 5(b) as a "public trust for native Hawaiians and the general public." Haw. Const. art. XII, § 4. In 1978, the Hawaii legislature established the Office of Hawaiian Affairs ("OHA") to serve "native Hawaiians and Hawaiians." Haw. Const., art. XII, § 6. OHA was funded in part by granting it a share of the trust income created out of the § 5(b) lands. Haw. Rev. Stat. § 10-3.[2] Defendants are current or former trustees of OHA.

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[2] § 10-3, as it existed in 1988, identified the purposes of OHA, which included the betterment of conditions of native Hawaiians and Hawaiians. With regard to the betterment of conditions of native Hawaiians, the statute provided:

> **Purpose of the office.**
>
> The purposes of the office of Hawaiian affairs include:
>
> (1) The betterment of conditions of native Hawaiians. A pro rata portion of all the funds derived from the public land trust shall be funded in an amount to be determined by the legislature for this purpose, and *shall be held and used solely as a public trust for the betterment of the conditions of native Hawaiians.*

(emphasis added). § 10-13.5, which provided for the use of public land trust proceeds, provided:

> **Use of public land trust proceeds.**
>
> Twenty per cent of all funds derived from the public land trust, described in section 10-3, shall be expended by the office, as defined in section 10-2 [definition of "office" means OHA] for the purposes of this chapter.

Chapter 10 was amended effective July 3, 1990, and applicable retroactively to June 16, 1980. § 10-3 was revised to only refer to the

(continued...)

On October 18, 19[88], plaintiffs[3] filed the complaint herein alleging that defendants violated 42 U.S.C. § 1983 by managing income derived from § 5(b) lands in a manner that contravenes § 5(f) of the Admission Act. Specifically, plaintiffs contend that defendants commingled OHA' share of income from the § 5(f) trust with other OHA funds; and that defendants have expended portions of that income other than to benefit native Hawaiians, and that in particular, have used portions of that income for the benefit of persons denominated as "Hawaiians."[4] *See* Complaint, ¶¶ 14-16.

On January 11, 1989, this court granted defendants' motion to dismiss the complaint and held that the complaint failed to state a claim because the Admission Act did not impose the obligations which plaintiffs assert were violated, and because the suit was against defendants in their official capacities and therefore barred by the Eleventh Amendment. Judgment was entered in

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[2](...continued)
purposes of OHA; references to use of public trust funds was deleted. § 10-13.5 was amended as follows:

Use of public land trust proceeds.

Twenty per cent of all revenue derived from the public land trust shall be expended by the office for the betterment of the conditions of native Hawaiians.

[3] Plaintiff The Hou Hawaiians is alleged to be a native Hawaiian Ohana or tribe made up of related families of native Hawaiians of 50% or more Hawaiian ancestry. Plaintiff Doctor Nui Loa Price is alleged to be a hereditary chief of the Hou Hawaiians and a native Hawaiian. Plaintiff Kamuela Price is alleged to be a member of the elder council of the Hou Hawaiians. Complaint, ¶ 2.

[4] Under both the Hawaiian Homes Commission Act § 201-7 and Hawaii Revised Statutes § 10-2, «native Hawaiian» is defined as any descendant «of not less than one-half part of the races inhabiting the Hawaiian Islands previous to 1778 . . . .»

«Hawaiian» is defined under Hawaii Revised Statutes § 10-2 as «any descendant of the aboriginal peoples inhabiting the Hawaiian Islands . . . in 1778.»

favor of defendants on January 17, 1989, and plaintiffs appealed.

On March 21, 1991, the Ninth Circuit reversed the judgment of this court. The Ninth Circuit held that plaintiffs stated a claim under 42 U.S.C. § 1983 for violations of § 5(f) by alleging in their complaint that defendants have expended the trust income on purposes other than those listed in § 5(f). *Price v. Akaka*, 928 F.2d 824, 826, (9th Cir.), *cert. denied* 112 S.Ct. 436 (1991). The Ninth Circuit also held that although the complaint did not state that the plaintiffs were suing the trustees in their individual capacity, the complaint would be so construed because plaintiffs were suing defendants for money damages. *Id.* at 828. Accordingly, the Ninth Circuit found that the action was not barred by the Eleventh Amendment. *Id.*

On remand, defendants have filed an answer to the complaint, and now move to dismiss the action on several alternate grounds as follows: (1) that either judgment on the pleadings or summary judgment is appropriate because plaintiffs' claims fail on the merits, (2) defendants are entitled to qualified immunity, (3) defendants are entitled to absolute immunity, and (4) § 5(f) is unenforceable via 42 U.S.C. § 1983 in view of *Suter v. Artist M.*, 112 S.Ct. 1360 (1992). Plaintiffs have filed several counter motions, including a motion to amend the complaint, a motion to strike exhibits, a request for a Rule 56(f) continuance and a motion for sanctions.

DISCUSSION

As set forth above, defendants seek a dismissal of the complaint against them on several alternate grounds. The court will first address whether plaintiffs can assert a § 1983 action in view of the decision by the United States Supreme Court in *Suter v. Artist M.*

I. *Whether Plaintiffs Have Standing To Bring This Action*

On March 25, 1992, the Supreme Court rendered its opinion in *Suter v. Artist M.*, 112 S.Ct. 1360 (1992). In that case, the Supreme Court held that the Adoption Assistance and Child Welfare Act of 1980 ("The Act"), a federal spending law, did not create enforceable rights under 42 U.S.C § 1983.

The Act established a federal reimbursement program for certain expenses incurred by the States in administering foster care and adoption services. One of the requirements of the Act was that the States make reasonable efforts to prevent removal of children from their homes and to facilitate reunification of families where removal had occurred. 42 U.S.C. § 671(a)(15).

The Seventh Circuit held that the Act contained an implied right of action, and that respondents could enforce this section of the Act through an action brought under § 1983 as well. The Supreme Court reversed, holding that the Act did not create an enforceable right on behalf of the plaintiffs.

The Court stated that the relevant issue was whether the Act "unambiguously confer[red] upon the child beneficiaries of the Act a right to enforce the requirement that the State make 'reasonable efforts' to prevent a child from being removed from his home, and once removed to reunify the child with his family." 112 S.Ct. at 1367.

In resolving the question, the Court first noted that Congress had left up to the States how it was to comply with the directive that it make "reasonable efforts," and that other sections of the Act provided enforcement mechanisms for the reasonable efforts clause, including the authority vested in the Secretary of Health and Human Services to reduce or eliminate payments to the State on finding that the State was not complying with the Act. The Court stated that while "these statutory

provisions may not provide a comprehensive enforcement mechanism so as to manifest Congress' intent to foreclose remedies under § 1983, they do show that the absence of a remedy to private plaintiffs under § 1983 does not make the reasonable efforts clause a dead letter." 112 S.Ct. at 1368-69.

The Court concluded:

> Careful examination of the language relied upon by respondents, in the context of the entire Act, leads us to conclude that the "reasonable efforts" language does not unambiguously confer an enforceable right upon the Act's beneficiaries. The term "reasonable efforts" in this context is at least as plausibly read to impose only a rather generalized duty on the State, to be enforced not by private individuals, but by the Secretary in the manner previously discussed.

Id. at 1370. Having concluded that the Act did not create a federally enforceable right to "reasonable efforts" under § 1983, the Court then turned to whether an implied right of action for private enforcement existed. The Court stated:

> Under the familiar test of *Cort v. Ash*, 422 U.S. 66 (1975), the burden is on respondents to demonstrate that Congress intended to create the private remedy sought by the plaintiffs. *Transamerica Mortgage Advisors, Inc. v. Lewis*, 444 U.S. 11, 15-16 (1979) ("[W]hat must ultimately be determined is whether Congress intended to create the private remedy asserted."). As discussed above, we think that Congress did not intend to create a private remedy for enforcement of the "reasonable efforts" clause.
>
> We conclude that 42 U.S.C. § 671(a)(15) neither confers an enforceable private right on its beneficiaries nor creates an implied cause of action on their behalf.

Id. The dissent in *Suter* pointed out that the Court's decision was plainly inconsistent with its previous cases addressing § 1983 enforcement. *See id.* at 1371 (Blackmun, J., dissenting). Justice Blackmun stated that the majority reached its conclusion "without even stating, much less applying, the principles our precedents have used to determine whether a statute has created a right unenforceable under § 1983." *Id.*

Based on *Suter*, defendants argue that *Keaukaha-Panaewa Community Association v. Hawaiian Homes Commission*, 739 F.2d 1467, (9th Cir. 1984) ("*Keaukaha II*") and its progeny is no longer good law. In *Keaukaha II*, the Ninth Circuit held that § 5(f), although not encompassing an implied right of action, did allow for a 1983 action. The Court found that the enforcement device provided by § 5(f) was not so comprehensive as to signal preclusion of a § 1983 action asserting violations of § 5(f).

Defendants argue that *Suter* is directly at odds with *Keaukaha II* because § 5(f) does not "unambiguously confer" upon native Hawaiian beneficiaries the right to sue for violations of the Admissions Act; further, defendants argue that the Admissions Act provides a federal enforcement mechanism in the form of a suit by the United States, and therefore, as in *Suter*, the absence of a private remedy does not make the requirements of § 5(f) unenforceable.

In *Keaukaha II*, the Ninth Circuit specifically found under then established Supreme Court precedent, that the enforcement devices of the Admission Act were not comprehensive enough to signal preclusion of a section 1983 remedy. Although as pointed out by Justice Blackmun in his dissent, *Suter* appears to disregard, without explanation, established law, *Suter* did not overrule any previous authority, and in fact, was limited to the issue of whether the Adoption and Assistance

Child Welfare Act of 1980 created an implied right of action or federally enforceable right under § 1983.

And while this court acknowledges that the Supreme Court in *Suter* appears to have retreated from prior precedent, in the absence of an overruling of prior precedent, this court cannot disregard the Ninth Circuit's ruling in *Keaukaha II*, and the direct mandate to this court that plaintiffs in this case have stated a claim under § 5(f) of the Admission Act that is enforceable via § 1983.[5]

II. *Whether Plaintiffs' Claims Are Barred By Qualified Immunity*

In *Harlow v. Fitzgerald*, 102 S.Ct. 2727 (1982), the United States Supreme Court held that "government officials performing discretionary functions generally are shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Id.* at 2738. The Court stated:

> Reliance on the objective reasonableness of an official's conduct, as measured by reference to clearly established law, should avoid excessive disruption of government and permit the resolution of many insubstantial claims on summary judgment. On summary judgment, the judge appropriately may determine, not only the currently applicable law, but whether that law was clearly established at the time an action occurred. If the law at that time was not clearly established, an official could not reasonably be expected to anticipate subsequent legal developments, nor could he fairly be said to "know" that the law forbade conduct not previously identified as

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[5] The Ninth Circuit specifically held that plaintiffs have standing to bring the instant action. *Price v. Akaka*, 928 F.2d 824, 826 n.2, (9th Cir. 1991).

> unlawful. Until this threshold immunity question is resolved, discovery should not be allowed. If the law was clearly established, the immunity defense ordinarily should fail, since a reasonably competent public official should know the law governing his conduct. Nevertheless, if the official pleading the defense claims extraordinary circumstances and can prove that he neither knew nor should have known of the relevant legal standard, the defense should be sustained. But again, the defense would turn primarily on objective factors.

Id. Further, in *Anderson v. Creighton*, 107 S.Ct. 3034 (1987), the Court stated:

> It should not be surprising, therefore, that our cases establish that the right the official is alleged to have violated must have been "clearly established" in a more particularized, and hence more relevant, sense: The contours of the right must be sufficiently clear that a reasonable official would understand that what he is doing violates that right. This is not to say that an official action is protected by qualified immunity unless the very action in question has previously been held unlawful, see *Mitchell*, 472 U.S., at 535, n. 12, 195 S.Ct, at 2829, N.12; but it is to say that in the light of preexisting law the unlawfulness must be apparent. (citations omitted).

Id. at 3039. The critical question is therefore whether the defendants' conduct violated clearly established law at the time that conduct occurred. *Harlow* at 2738; *Mitchell v. Forsyth*, 195 S.Ct. 2806, 2818 (1985)

The court must first determine what conduct plaintiffs are alleging as violative of their rights. The complaint alleges that defendants violated 42 U.S.C. § 1983 by managing income derived from § 5(b) lands in a manner that contravenes § 5(f) of the Admission Act. Plaintiffs contend that defendants have commingled OHA's share of income from the § 5(f) trust with other

OHA funds and that defendants have expended portions of that income other than to benefit native Hawaiians, and have particularly used portions of that income for the benefit of persons denominated as Hawaiians.

At the December 27, 1991 hearing on this matter, plaintiffs stated that the specific wrongful conduct known at this time was the alleged use of § 5(f) funds to fund a nonbinding mail-out referendum initiated by the trustees in November of 1988. Plaintiffs also stated that the combined revenue expenditure balance sheets for OHA for the years 1982 through 1986 evidenced a transfer of monies from the § 5(f) fund into OHA's general fund, and that these balance sheets establish that § 5(f) funds were thus improperly used to benefit all of OHA's beneficiaries.[6]

A. *Whether the Use Of § 5(f) Monies to Fund the Single Referendum Issue Violated Clearly Established Law*

Plaintiffs challenge OHA's use of § 5(f) funds to fund a nonbinding mail-out referendum in November of 1988. The referendum was proposed by OHA to determine whether their constituents' favored an amendment of the definition of native Hawaiians to include all Hawaiians. Defendants accordingly sought to use § 5(f) funds for this referendum, as they felt that adoption of a single

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[6] Defendants objected at the hearing to plaintiffs arguing that the transfers of these funds into the OHA general fund was part of their claim in this case. Defendants state that throughout this litigation, and including plaintiffs opposition to defendants' writ of certiorari to the United States Supreme Court, plaintiffs have limited their claim to the use of § 5(f) funds to fund the referendum. Accordingly, defendants did not brief summary judgment on the issue of commingling § 5(f) funds with OHA general funds. Because the issue had not been briefed by either party, the court requested additional briefing from the parties on this limited issue and set the matter for further hearing on April 29, 1992. The court heard the parties' argument on the additional claim which is now properly before this court.

definition would better the condition of native Hawaiians, in that the blood quantum requirement had long been recognized as the single most divisive issue in the Hawaiian community.[7]

Plaintiffs state that the law was clear that § 5(f) permits income from the trust to be used only for the five enumerated purposes therein and expressly provides that use of said funds for any other purpose shall constitute a breach of trust. Accordingly, plaintiffs contend that OHA's use of such funds to benefit both native Hawaiians *and* Hawaiians is a violation of the law which is expressly set forth in § 5(f). Plaintiffs also point to Chapter 10 of the Hawaii Revised Statutes which governs OHA's handling of the pro rata portion of funds from the public land trust, which expressly provides that such funds are to be "held and used solely as a public trust for the betterment of the conditions of native Hawaiians." Haw. Rev. Stat. § 10-3.[8]

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[7] In *Hoohuli v. Ariyoshi*, 631 F.Supp. 1153 (D.Haw. 1986), the court discussed the blood quantum requirement and the divisive effect it had on the Hawaiian community. The court noted that there was evidence before the Hawaii legislature indicating that «defining 'Hawaiian' to include all people of aboriginal blood could help alleviate divisiveness in the Hawaiian community resulting from blood quantum restrictions.» 631 F.Supp. at 1161.

[8] In fact, plaintiffs argue that the law was so clearly established on the face of the Admissions Act, that this case does not even involve discretionary functions on the part of public officials. This court, however, finds this argument unpersuasive. In *Davis v. Scherer*, 194 S.Ct. 3012, 3020 n. 14 (1984), *reh'g denied* 195 S.Ct. 26 (1984), the Supreme Court held that «[o]fficials sued for constitutional violations do not lose their qualified immunity merely because their conduct violates some statutory or administrative provision.» *Id.* at 3019. The Court stated that as acknowledged in *Harlow*, officials may lose their immunity by violating «clearly established statutory . . . rights.» *Id.* n. 12 (citing *Harlow*, 102 S.Ct. at 2738). However, «[a] law that fails to specify the precise action that the official must take in each instance created only discretionary authority; and that

(continued...)

Plaintiffs contend that Attorney General Opinion No. 83-2 dated April 15, 1983, likewise interpreted the literal language of § 5(f) to prohibit the use of public trust funds other than to benefit native Hawaiians. In this opinion, the Attorney general of the State of Hawaii[9] answered the following question posed by OHA:

> By letter dated March 15, 1983, you requested our opinion on the following question:
>
> May the legislature, consistent with Section 5(f) of the Admission Act and Article XII of the State Constitution, authorized [sic] OHA to use funds derived from the Public Land Trust (Section 5(f) of the Admission Act) to better the conditions of Hawaiians as defined in Hawaii Revised Statutes, Section 10-2(5)?
>
> We answer in the negative.

See Exhibit R to Exhibit R to defendants' motion. Plaintiffs accordingly contend that defendants are not entitled to qualified immunity because the law was clearly established as far back as 1983 that § 5(f) funds could not be used to better the conditions of Hawaiians.

Defendant preliminarily argue that it was not "clearly established" during the years in question that a disposition of § 5(f) revenue to OHA was a disposition under § 5(f) that continues further federal judicial supervision over grantee activities. Defendants state that prior to the Ninth Circuit opinion in this case, the Ninth Circuit had rejected plaintiffs' procedural claims in a virtually identical context, citing to *Price v. State of Hawaii*, 921

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[8](...continued)
authority remains discretionary however egregiously it is abused.› *Id.* at 3020, n. 14. The court finds that § 5(f) fails to specify the precise action an official must take and therefore, creates only discretionary authority.

[9] The letter was signed by then Deputy Attorney General Charlotte E. Libman, and signed ‹Approved› by then Attorney General Tany B. Hong.

F.2d 950 (9th Cir. 1990).[10] The Ninth Circuit in *Price v. State of Hawaii*, however, did not find that an expenditure of § 5(f) funds for other than the purposes enumerated therein was acceptable, but rather found that a bare allegation of misappropriation of funds without

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[10] In that case, the same plaintiffs brought an action against various state defendants claiming that the State and its officials were in violation of § 5(f) of the Admissions Act because they failed to keep the ceded lands, and the income from those lands, segregated from other state assets and income, and because they had scattered those lands among various departments and agencies of the State, and failed to invest prudently. 921 F.2d at 954. The Ninth Circuit noted that the language of § 5(f) expressly provides that the State is to have the power to manage the property and its income in a manner that the constitution and laws of the State provide, and held that it was not for the federal courts to declare that certain methods of holding, managing and accounting for the ceded lands and income must be followed by the State. *Id.* at 956. The Court stated:

> It follows that the appellants cannot succeed on their claims that section 5(f) has been violated simply because the State has commingled the ceded lands and their income with other lands and income, or because it has not invested in what appellants deem to be a prudent manner, or because the lands are in the hands of various departments and agencies of the State. As we noted in *Price v. Akaka*, as long as the lands or income remain in the hands of the State they remain impressed with the public trust created by the Act. 915 F.2d 472. It is true that we would lift our eyebrows were a private trustee to commingle trust funds committed to its administration, but that does not suggest that we should find that the State and its officials have violated section 5(f) when *they* do so.
>
> That does not mean that the State can do what it likes with the property and the income. Rather, the federal courts must ultimately determine whether the property has been diverted from section 5(f) purposes. That would, however, have to be in the context of litigation brought by the United States under section 5(f) or in the context of private litigation under Section 42 U.S.C. § 1983 which focused on some particular diversion. The action by these very appellants in *Price v. Akaka* is precisely that kind of litigation.

Id. at 956.

focus on any particular diversion was not sufficient to state a claim. Further, the decision in *Price v. State of Hawaii* was rendered in 1990 and the court does not see how this decision is dispositive of "whether the law was clearly established at the time an action occurred." *Harlow*, 192 S.Ct. at 2738.

Further, defendants argue that the decision in *Kepoo v. Burgess*, No. 88-2987-09, an action filed in the First Circuit Court of the State of Hawaii in September 1988, is dispositive of the qualified immunity issue in this case. Plaintiffs in that action brought suit against the trustees of OHA, Governor John Waihee and the State of Hawaii arising out of the 1988 referendum which is the subject of this action. Plaintiffs contended that the trustees breached their fiduciary duty to administer the income from the § 5(f) trust by advocating a single beneficiary class definition of native Hawaiian, and expending special trust fund monies to inform and educate their constituents about the single definition referendum. Summary judgment was granted in favor of the trustees in that case. Although the order granting the trustees motion for summary judgment did not specify the basis of the court's ruling, a previous order denying plaintiffs' motion for preliminary injunction indicated that the court found that no § 5(f) funds were expended on the single definition referendum. The Hawaii Supreme Court affirmed the lower court decision in a memorandum opinion on November 21, 1989. The court, without discussing the basis of its ruling, stated that it found no reversible error on the record before it, however, the court expressed disagreement with the state's assertion that the legislature could alter the intended purposes of the section 5(f) trust. Defendants argue that while the unpublished *Kepoo* decision cannot be cited for precedential value, the result establishes that defendants have not violated clearly established law by their actions in the present case. Since the *Kepoo* decision was rendered after the conduct alleged as

wrongful in this case occurred, this court does not find *Kepoo* dispositive on the qualified immunity issue. Further, even considering the entire *Kepoo* record submitted, the court finds that the record itself is less than clear as to the basis for the unpublished ruling.

Defendants also argue that the law with regard to the use of § 5(f) monies to fund the single definition referendum was not clearly established in 1988 as shown by the numerous opinions on the subject obtained from the State Attorney General's Office and OHA's own counsel. For example, OHA's own counsel opined in July 12, 1988 that the use of such funds would be proper if a benefit to the trust beneficiaries could be shown. *See* Exhibit J to Exhibit O of defendant's motion.

Further, defendant Moses Keale, Sr. requested an opinion from the State Attorney General as to the appropriateness of using § 5(f) funds to finance the referendum in July 1988. Specifically, Mr. Keale requested an opinion as to whether special funds derived from the public land trust and set aside to be held and used solely as a "public trust for the betterment of conditions of native Hawaiians", section 10-3(1), HRS, could properly be expended to advocate a change in existing law to create a single definition of the term "native Hawaiian" to include "Hawaiians" as the term is defined in section 10-2.

On July 28, 1988, the Attorney General's Office advised OHA that the use of special funds for the purpose of bettering the conditions of all Hawaiian people, rather than just native Hawaiians would not be proper. The letter from the Attorney General[11] provided in relevant part:

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[11] The letter was signed by then Deputy Attorney General Charlotte E. Libman and signed ‹Approved› by Attorney General Warren Price, III.

> Thus, we conclude that the use of funds derived from the ceded land funds to advocate a change in the law to provide for a single definition, is not a use *solely* for the betterment of conditions of native Hawaiians. Furthermore, such a use is inconsistent with the foremost goal to be pursued by OHA, the betterment of conditions of native Hawaiians.

See Exhibit S to Exhibit R to defendants' motion.

The Attorney General's Office subsequently conducted a formal investigation into the expenditure of native Hawaiian public trust funds by OHA, and issued an investigative report on November 2, 1988. The Attorney General's Office discussed the specific expenditures of public trust funds for the single issue referendum[12] and concluded that none of the expenditures warranted any legal action for breach of trust. The Attorney General found that the funds that had actually been expended did in fact benefit native Hawaiians, and that the OHA trustees acted reasonably and prudently in advocating the single definition of Hawaiian. However, the Attorney General also recommended that OHA not use any further public trust funds where the single issue is involved. *See* Exhibit 1 to Exhibit Q to defendants' motion.

This court finds that the law was sufficiently clear in 1988 that a reasonable official would understand that the expenditure of § 5(f) funds to benefit non-native Hawaiians was a violation of § 5(f). First, § 5(f) provides for management and disposition of the funds in accordance with the five purposes set forth therein "in such manner as the constitution and laws of said State may

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[12] This included appropriations of $23,200 for a media/public relations campaign to educate OHA beneficiaries and to advocate ratification the single definition referendum, $10,000 as part of a "protocol" fund for the Ad Hoc Committee working on the proposed referendum, and $57,000 for a professional advertising campaign.

provide." In accordance with this directive, the State in establishing OHA, statutorily provided that the public trust funds appropriated to OHA could only be used for the benefit of native Hawaiians. *See* footnote 2, *supra.*

Further, the Attorney General opinion issued in *1983* unequivocally advised OHA that the Hawaii legislature could not authorize the use of § 5(f) funds to better the conditions of Hawaiians. Accordingly, this court finds that the contours of the law in 1988 was "sufficiently clear that a reasonable official would understand that what he was doing violates that right." *Anderson,* 197 S.Ct. at 3039. Therefore, if § 5(f) funds were used to advance the single definition referendum, defendants would not be entitled to qualified immunity for their actions.

B. *Whether Defendant Violated Clearly Established Law By Transferring Trust Funds Into The OHA General Fund*

Plaintiffs submitted the Combined Statement of Revenues, Expenditures, and Changes in Fund Balances of OHA for the fiscal years 1982 through 1986 in opposition to the instant motion. Plaintiff states that these balance sheets establish that OHA is commingling § 5(f) funds with OHA general funds and that the *expenditure of § 5(f) funds* for the benefit of Hawaiians in general, as distinguished from native Hawaiians constitutes a specific breach of federal law.[13] Plaintiff accord-

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[13] At page 34 of the exhibit submitted by plaintiffs, there is shown a «use» of Special Fund Revenues of $589,366 denoted as and «Operating transfer out» and a «financing source» in the general funds managed by OHA of $583,322» in the «other financing sources» category of the financial statement, in the amount of $583,332. *See* Exhibit E to the Declaration of Walter R. Schoettle In Opposition To Defendants' Motion For Judgment On The Pleadings, Or, In The Alternative For Summary Judgment, And conditional Motion For Stay, filed herein on December 13, 1991.

ingly attempts to distinguish *Price v. State of Hawaii* discussed in footnote 10 above.[14]

Defendants initially argue that plaintiffs have failed to plead the alleged violations with regard to the commingling of trust and OHA general funds with the specificity as required by *Branch v. Tunnell*, 937 F.2d 1382, 1886, (9th Cir. 1991)[15] and that therefore, the failure to dismiss this action on the basis of qualified immunity would be error. The court does not find this case to involve allegations of a constitutional tort and therefore, does not find *Branch* dispositive of this case. Further, the court finds that plaintiffs' complaint sufficiently puts the defendants on notice that plaintiffs are alleging commingling and use of § 5(f) funds for the benefit of both Hawaiians and native Hawaiians in violation of the statutory mandate.[16]

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[14] In *Price v. State*, the Ninth Circuit warned against the practice of commingling even though it held that commingling was not a breach of trust *per se*. The court stated:

> Needless to say, state officials do run a substantial risk if they so commingle assets that they cannot defend claims that improper expenditures have been made. That is particularly true when, as we have now twice held, those lands and their income remain subject to the trust while they are in the hands of state governmental entities. However, that presents no triable issue in this case.

921 F.2d at 959 (footnote omitted).

[15] The Ninth Circuit, in *Branch*, held that a heightened pleading standard applies in cases in which subjective intent is an element of a constitutional tort action. The court stated that bare allegations of improper purpose are insufficient to subject government officials to discovery and the related burdens of defending a lawsuit, and that to survive a motion to dismiss, «plaintiffs must state in their complaint nonconclusory allegations setting forth evidence of unlawful intent.» 937 F.2d at 1386. *Branch* was a *Bivens* action alleging judicial deception by government agents in obtaining a search warrant.

[16] The Complaint specifically alleges:

(continued...)

Defendants state that the transfer of trust funds into the OHA general fund does not constitute a violation of clearly established law because the Hawaii state legislature has directed OHA to use special funds to pay for a portion of the operating expenses of OHA. In this regard, defendants point to the legislative Act which appropriates funds for the biennial budget of OHA. For example, with respect to Fiscal year 1985, the Legislature, in the Act of July 1, 1985, Ch. 193, 1985 Haw. Sess. L. 328, expressly directed that "[t]he Office of Hawaiian Affairs and the State of Hawaii shall share equally in the costs of fringe benefits paid for employees of the Office of Hawaiian Affairs." *See* Attachment 2 to defendants' supplemental memorandum filed herein on March 2, 1992, § 6.

The court finds that the use of § 5(f) funds to pay for a portion of the operating expenses of OHA does not violate clearly established law. In fact, the clearly established state law requires the use of matching funds to pay the operating costs of OHA's offices. Because

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[16](...continued)

14. On information and belief, Defendants have not held the TRUST INCOME and income therefrom separate and apart from the other funds held by Defendants; and have failed to manage and dispose of the TRUST INCOME and reinvest the income therefrom in a reasonably prudent manner towards the purposes and uses enumerated by Congress and in particular for the betterment of persons of 50 percent or more Hawaiian ancestry.

15. On information and belief, Defendants have commingled the TRUST INCOME and income therefrom with other funds of said Defendants.

16. On information and belief, Defendants have expended portions of the TRUST INCOME for uses and purposes other than those purposes permitted by § 5(f) of the Admission Act, and in particular, have expended said TRUST INCOME for the benefit of persons denominated as «Hawaiians» who are persons of less than 50% Hawaiian ancestry and who are not beneficiaries of the § 5(f) Trust.

See Complaint filed herein on October 18, 1988.

OHA's statutorily mandated constituency consists of both Hawaiians and native Hawaiians, the Hawaii legislature has mandated that use of public trust funds also be used to fund operations. Under these circumstances, the commingling of special funds with general funds for this purpose would not be a violation of clearly established law.

III *Whether Defendants Are Entitled To Summary Judgment*

The court will next consider whether defendants are entitled to summary judgment on the merits with regard to plaintiffs' claims that § 5(f) funds were improperly expended on the single issue referendum. Defendants argue that summary judgment in their favor is appropriate on this issue because as discussed in pages 16 through 18 of this decision, the Hawaii courts have ruled on this issue in *Kepoo v. Burgess* No. 88-2987-09, and found that no such funds were expended.

Plaintiffs object to the court's application of the judgment in the *Kepoo* case to the instant action because plaintiffs were not parties to the *Kepoo* case, and because the Hawaii Supreme Court decided *Kepoo* by memorandum opinion. *See* discussion at pages 16 through 18 above. Plaintiffs state that Exhibits "E" through "R", which set forth the record in the *Kepoo* case cannot be considered by the court, and in fact should be stricken from the record. Defendants state that while the findings in the *Kepoo* case may not be binding on this court, the court can nevertheless consider the documentation submitted to the lower court in that case and make its own independent determination based on this information.

The court agrees that it can consider properly submitted evidence at any time and will consider such evidence presented to it. The court will not strike the exhibits as all of the exhibits are part of the public record in the *Kepoo* case. However, the court cannot

apply underlying evidentiary rulings made by the lower state court to plaintiffs who were not parties to that action. Further, as noted above, the record in the *Kepoo* case is less than clear as to the basis for the Hawaii court's ruling.

Turning to the merits of defendants' motion, this court is hampered in its analysis of this issue by the fact that defendants do not specifically point out what facts or evidence supports summary judgment in their favor. Rather, defendants attach the voluminous record in the *Kepoo* case and state that the lower court judge "properly found that there was no evidence to support the claim that 5(f) funds were in fact spent on the single definition issue within any time frame to which this Complaint applies." *See* Motion at p. 21.

In *Celotex Corp. v. Catrett*, 106 S.Ct. 2548 (1986), the Supreme Court stated that:

> . . . a party seeking summary judgment always bears the initial responsibility of informing the district court of the basis for its motion, and identifying those portions of the "pleadings, depositions, and answers to interrogatories, and admissions on file, together with the affidavits, if any," which it believes demonstrates the absence of a genuine issue of material fact.

Id. at 2553. And while defendants do not have the burden of negating plaintiffs' claims, the moving party does have the responsibility of demonstrating to the court that the standard for summary judgment has been satisfied. *Id.*

Accordingly, this court finds that defendants have not sustained their initial responsibility of informing the court of the basis of its motion, by at a minimum pointing to those facts which they believe demonstrates the absence of a genuine issue of material fact. Further, plaintiffs have requested additional time to do discovery

should this court reach the merits of defendants' motion for summary judgment.

Rule 56(f) provides:

> **(f) When Affidavits are Unavailable.** Should it appear from the affidavits of a party opposing the motion that the party cannot for reasons stated present by affidavit facts essential to justify the party's opposition, the court may refuse the application for judgment or may order a continuance to permit affidavits to be obtained or depositions to be taken or discovery to be had or may make such other order as is just.

Plaintiffs have submitted the Declaration of Walter R. Schoettle, wherein Mr. Schoettle states that because of the prior appeal of this matter to the Ninth Circuit and because of defendants seeking of summary judgment on the grounds of qualified immunity, plaintiffs have not been able to conduct discovery to respond to a motion for summary judgment on the merits. Plaintiffs state that they seek to depose the defendants in this action, and attached their notice of taking deposition of all defendants which they served on December 20, 1991, to the Schoettle Declaration. On December 23, 1991, defendants filed their motion for protective order seeking to prohibit this discovery. The magistrate judge granted this motion on December 23, 1991.

The court finds that plaintiffs are entitled to conduct discovery as to the merits of their claims against the defendants. The court further finds that plaintiffs have been unable to pursue discovery in this case based on the Ninth Circuit appeal of this court's order granting defendants' motion to dismiss,[17] as well as the petition

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[17] Defendants' motion to dismiss was filed prior to defendants filing an answer in this case. After the issuance of this court's order granting defendants' motion to dismiss, this matter was on appeal to

(continued...)

for certiorari filed by defendants to the United States Supreme Court. Further, on November 18, 1991, the day the Supreme Court denied defendants' petition for certiorari, defendants filed the instant motion seeking a disposition in their favor on qualified immunity grounds. Under these circumstances, the court cannot find that plaintiffs have failed to diligently pursue discovery. The motion for summary judgment is accordingly denied at this time.

IV *Whether Defendants Are Entitled to Absolute Immunity*

Defendants contend that they are entitled to absolute legislative immunity for their spending decisions. Defendants argue that like legislators, they may not be held personally liable for spending decisions that violate the Establishment Clause. *See* defendants' motion at p. 25.

The United States Supreme Court has recognized "absolute immunity" for (1) legislators in their legislative functions, (2) judges in their judicial functions, (3) prosecutors and similar officials, (4) executive officers engaged in adjudicative functions and (5) the President of the United States. Absolute immunity is warranted for these officials because their special functions or constitutional status requires complete protection from suit. *Harlow, supra* at 2732. For executive officials in general, however, qualified immunity represents the norm. *Scheuer v. Rhodes*, 94 S.Ct. 1683 (1974).

In *Scheuer*, the Court held that state executive officials, in a suit for damages arising from unconstitutional action, were entitled only to qualified immunity, subject to those exceptional situations where it is

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[17](...continued)
the Ninth Circuit until the mandate was issued to this court in April 1991.

demonstrated that absolute immunity is essential for the conduct of public business. The reason for so limiting defendants' immunity was that it was not unfair to hold liable the official who knows or should know he is acting outside the law, and that insisting on an awareness of clearly established constitutional limits will not unduly interfere with the exercise of official judgment.

Defendants are accordingly entitled to absolute immunity only if they can show that they come within an exception to the general rule. In this regard, the Supreme Court has recognized that there are some officials whose special functions require a full exemption from liability. *See Butz v. Economu*, 98 S.Ct. 2894, 2911-13 (1978) (executive officials performing adjudicatory functions entitled to absolute immunity). Defendants argue that they are called upon to make spending decisions, and that this special function qualifies them for absolute immunity legislators are accorded in their spending functions, in so far as it is their "functional" tasks that require immunity. *Supreme Court of Virginia v. Consumers Union*, 100 S.Ct. 1967 (1980)

This court does not find that defendants have sustained their burden of establishing that they are entitled to absolute immunity for their actions. The court finds that defendants could receive the requisite protection from qualified immunity, and that this case does not present one of those exceptional situations where it is demonstrated that the official's function requires a full exemption from liability.

V. *Plaintiff's Motions to Strike, To Amend, And For Rule 11 Sanctions*

Plaintiffs have requested leave to amend their complaint to correct any defects the court may find in the pleadings as a result of defendant's motion. As set forth above, the court has found that plaintiff's complaint sufficiently stated a claim for violations of § 5(f) in connection with the use of trust funds to fund the single

referendum issue, and with regard to the transfer of § 5(f) funds into the OHA general fund. Accordingly, the request for leave to amend the complaint is moot.

Plaintiffs' motion to strike defendants' exhibits set forth the entire record in the *Kepoo* case has also been denied as set forth above.

Plaintiffs request that the court issue Rule 11 sanctions against defendants for the bringing of this motion. The court finds the instant motion to be well grounded in both fact and law, and does not find that the motion was brought for an improper purpose. Plaintiffs' motion for sanctions in accordingly denied.

VI *Defendants' Conditional Motion For Stay*

Defendants request that the court grant a stay of the action in the event the court denies any portion of their motion on the basis of qualified immunity, pending the resolution of any appeal they take on this issue.

In *Chuman v. Wright* No. 92-55007 (9th Cir. Mar. 27, 1992), the Ninth Circuit held that the filing of an interlocutory qualified immunity appeal automatically divests the district court of jurisdiction to proceed with trial pending appeal, unless the district court certifies in writing that the appeal is frivolous or waived. This court declines to issue such a certification in this case, and therefore under *Chuman*, all proceedings in this case are stayed pending appeal.

CONCLUSION

Based on the foregoing, defendants' motion for summary judgment is granted in part and denied in part as follows: (1) defendants are entitled to qualified immunity with regard to plaintiffs' claims that they improperly commingled and expended trust funds based on the 1982-1985 OHA operating statements, and (2) defendants' motion is denied on all other grounds.

Plaintiffs' motion to strike, motion to amend and motion for Rule 11 Sanctions are denied.

APPENDIX "C"

No. 92-16462

D.C. No. 88-0773-DAE

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

NUI LOA PRICE, DR., AKA MAUI LOA, individually and in his capacity as chief of the Hou Hawaiians; THE HOU HAWAIIANS, a native Hawaiian Ohana; KAMUELA PRICE, individually and in his capacity as member of elder council of the Hou Hawaiians, *Plaintiffs-Appellees*,

v.

MOANIKEALA AKAKA; ROD BURGESS; CLARENCE CHING; FRENCHY DESOTO; LOUISE HAO; MANU KAHAIALII; THOMAS KALUKUKUI, SR.; MOSES KEALE, SR.; and KEVIN MAHOE, *Defendants-Appellants*.

Appeal from the United States District Court for the District of Hawaii, David A. Ezra, District Judge, Presiding

Argued and Submitted May 5, 1993--Honolulu, Hawaii

Filed August 23, 1993

Amended November 2, 1993

Before: Alfred T. Goodwin, Thomas Tang and John T. Noonan, Jr., Circuit Judges

Opinion By Judge Tang

ORDER

IT IS ORDERED amending the opinion filed August 23, 1993, as follows:

Delete the following language at slip op. 9015 [App., p. 10a]: "In other words, we are unaware of any law indicating that elimination of the blood quantum requirement would not be for the "betterment of the conditions of native Hawaiians"--one of the five stated purposes of the land trust established by the Admission

Act.[7] To the contrary, established law suggests that amending the blood quantum requirement would benefit native Hawaiians. *See Hoohuli v. Ariyoshi* 631 F.Supp 1153, 1161 (D.Haw. 1986)"

Substitute the following language: "The restriction of section 5(f), incorporating the HHCA definition and confining the "betterment" purpose[7] of the lands trust funds to those of 50% or more blood, remains in place as governing federal law.[8] *See Hoohuli v. Ariyoshi*, 630 F.Supp. 1153, 1160 n.31 (D.Haw. 1986). While actually changing the definition of native Hawaiian contained in the HHCA, or the administration of OHA programs in conformance with a revised definition, would violate clearly established federal law, the Referendum did not do so. The OHA trustees reasonably believed that a referendum to determine Hawaiian opinion on the proper definition of "native Hawaiian" was for the "betterment of the conditions of native Hawaiians" as presently defined. *See Hoohuli*, 631 F.Supp. at 1161 (evidence showed. . . ."

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[7] Section 5(f) of the Admission Act states that the § 5(b) lands ‹shall be held by [Hawaii] as a public trust for the support of the public schools and other public educational institutions, for the *betterment of the conditions of native Hawaiians*, ... for the development of farm and home ownership on as widespread a basis as possible for the making of public improvements, and for the provision of lands for public use.› (Emphasis added). *See also Price v. State of Hawaii*, 764 F.2d 623, 625, (9th Cir. 1985) (‹*Price I*›) (‹Proceeds from the section 5(f) trust are to be devoted to 'one or more' of the five statutory purposes, one of which is 'for the betterment of the conditions of native Hawaiians.'›, *cert. denied*, 474 U.S. 1055 (1986).

[8] Also remaining in place are the restrictions placed by section 4 of the Admission Act on the ‹homelands,› which are not part of the trust administered by the OHA. *See Price I*, 928 F.2d at 826 n.1.

APPENDIX "D"

No. 92-16462

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

NUI LOA PRICE, DR., AKA MAUI LOA; THE HOU HAWAIIANS; KAMUELA PRICE,

Plaintiffs-Appellees,

v.

MOANIKEALA AKAKA, ET AL.

Defendants-Appellants.

Filed November 2, 1993

Cathy A. Catterson, Clerk

U.S. Court of Appeals

ORDER

Before: GOODWIN, TANG and NOONAN, Circuit Judges.

The panel as constituted above has voted to deny the petition for reharing and to reject the suggestion for rehearing en banc.

The full court has been advised of the suggestion for reharing en banc, and no judge of the court has requested a vote on the suggestion for reharing en banc. Fed. R. App. P. 35(b).

The petition for rehearing is denied and the suggestion for rehearing en banc is rejected.